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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re

DAVID A. RATHBUN
ETHELYN A. HACKETT-RATHBUN,

Debtor(s),

ERIC R.T. ROOST, Trustee,
ESTATE of RATHBUN,

Plaintiffs,

v.

ERVIN JOHN KERN & LERRINA A.
COLLINS,

Defendant(s).

Case No: 04-61113-fra7

Adv. Proc. No: 06-06077-fra

1ST AMENDED COMPLAINT

TURNOVER OF ESTATE PROPERTY
11 USC § 542

SALE OF JOINTLY-OWNED
PROPERTY
11 USC § 363(h)

Eric R.-T. Roost, trustee of the above-entitled estate, respectfully submits:

1. Plaintiff is the duly qualified and acting trustee of the estate of the above-named debtor, her petition being filed on February 19, 2004.

- 1 2. This Court has jurisdiction over this adversary proceeding, pursuant to 28
2 U.S.C. §§1334 and 157, and 11 U.S.C. §§ 363(h), 541 and 542.
3 3. This case is a core proceeding, pursuant to 28 U.S.C. § 157 (b) (2) (E), (N)
4 and (O).

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6 **ALLEGATIONS COMMON TO ALL CLAIMS**
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- 8 4. The Debtor Ethelyn Hackett-Rathbun, also known as Ethelyn A. Kern and
9 Ethelyn Anna Hackett ("Debtor") resides in a 1978 1884-square foot,
10 double-wide manufactured dwelling (Manufactured Home). Debtor is sole
11 owner of the Manufactured Home. Linn County Real Market Value for 05-06
12 is stated as \$25,770. There is no debt owing against the Manufactured
13 Home.
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15 5. Debtor's Manufactured Home sits on a 17.91-acre parcel of real property
16 ("Acreage"). Linn County Real Market Value for 05-06 is stated as \$131,190.
17 There is no debt owing against the Acreage.
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19 6. Prior to November 19, 1992, debtor was sole owner of the Acreage.
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21 7. Prior to November 19, 1992, and continuing until the present, Debtor has
22 resided upon the Acreage in her Manufactured Home.
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24 8. The Defendants are the children of the Debtor (Children).
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26 9. On November 19, 1992, Debtor conveyed a remaindermen's interest in the
Acreage by deed to her Children. Debtor retained a life estate in the
Acreage.

1 10. The sole purpose of the conveyance on November 19, 1992, was to prevent
2 Debtor's spouse at that time from obtaining any interest in the Acreage
3 through dissolution proceedings. In the event of Debtor's death, the transfer
4 was also designed for estate planning purposes to avoid a probate
5 proceeding.

6 11. Debtor has at all times subsequent to November 19, 1992, resided upon the
7 Acreage and paid all taxes and other expenses relating thereto.

8 12. Debtor testified under oath at her Meeting of Creditors that she had made
9 an agreement with her Children, once they were old enough, that if she
10 needed a different place to live, the Children would join in the sale of the
11 Acreage and the proceeds would be used to purchase Debtor another
12 dwelling.

13 13. Debtor listed total debts of \$118,326.70 in her bankruptcy schedules. One
14 creditor was listed at \$81,750 for a personal injury claim arising from an
15 automobile accident. The automobile insurance company, which provided
16 liability coverage on the automobile that Debtor was driving at the time of the
17 accident, has paid more than \$83,000 as a result of state court litigation and
18 a bad faith claim. As a result of insurance coverage, Debtor's scheduled
19 debt is presently not more than \$37,000.
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Claim 1: TURNOVER OF ESTATE PROPERTY
11 USC § 542

14. Plaintiff realleges and incorporates paragraphs 1–13, above, as though fully alleged herein.

15. The Children have legal title as remaindermen in the Acreage.

16. The sole purpose of Debtor's conveyance of the remaindermen's interest in the Acreage to her Children in 1992 was to prevent her spouse at that time from obtaining any interest in the Acreage and, in the event of Debtor's death, was designed for estate planning purposes to avoid a probate proceeding.

17. The Children paid no consideration for their remaindermen interest, nor have the Children, since receiving their remaindermen interest paid any expense related to the Acreage.

18. The Children were placed upon legal title by Debtor for purposes of convenience only and do not now own, nor at any time, have they owned any interest in the Acreage other than bare legal title.

19. Since November, 1992, the Debtor has retained and, at the time she filed her bankruptcy petition, continued to own full equitable interest in the Acreage.

20. The Children should be ordered to re-convey or turnover legal title to the Acreage to the bankruptcy estate.

1 21. The Debtor should be offered the opportunity to purchase the Acreage from
2 the estate for an amount that will fully pay her remaining creditors and
3 administrative expenses.
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10 **Claim 2: SALE OF PROPERTY OWNED JOINTLY WITH NON-DEBTOR**

11 **11 USC § 363(h)**

12 22. Plaintiff realleges and incorporates paragraphs 1 – 21, above, as though
13 fully alleged herein.
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15 23. In the event that the Court decides that the Children have an equitable
16 interest in the Acreage, the Plaintiff requests an order permitting the sale of
17 the Acreage and the Manufactured Home as a single residential unit.
18

19 24. Partition-in-kind of the Acreage between the bankruptcy estate and the
20 Children is impracticable.
21

22 25. Sale of the estate's undivided interest in the Acreage would realize
23 significantly less for the estate than sale of such property free of the
24 interests of the Children.
25

26 26. The benefit to the estate of the sale of such property, free and clear of the
interests of the Children, outweighs the detriment, if any, to the Children.

1 27. Said property is not used in the production, transmission, or distribution for
2 the sale of electric energy or of natural or synthetic gas or heat, light, or
3 power.

4 28. The Children are not presently residing on the Acreage, but have refused to
5 the sale of the Acreage or payment to the bankruptcy estate for its interest.

6 29. Plaintiff should have a judgment, pursuant to Bankruptcy Code 363(h),
7 authorizing sale of the aforementioned properties, subject to Defendant
8 Children's right to purchase said property at the price at which said sale is
9 to be consummated; and subject to Defendant Children receiving a notice
10 of proposed sale and right to object within 22 days of mailing of said
11 notice; and subject to the Defendant Children's right to their distribution of
12 such net proceeds from the sale as determined by the Court, less the
13 costs and expenses of such sale.
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17 **WHEREFORE**, plaintiff prays for a judgment:

18 A. Ordering Defendants to re-convey all of their interest in the Acreage, more
19 particularly described in the deed attached hereto as Exhibit "A," to the
20 bankruptcy estate, and granting the Debtor the exclusive right for 30 days to
21 purchase the Acreage for a price that will pay all valid claims and costs of
22 administration in full, taking into account the funds previously paid by the
23 automobile insurance company.
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1 C. In the event that the Court determines the Defendants do have some equitable
2 interest in the Acreage, determining the percentage amount or fractional share
3 belonging to Defendants.

4 D. In the event that the Court determines the Defendants do have some equitable
5 interest in the Acreage, authorizing the sale, free and clear of all liens, of the
6 Acreage, plus the Manufactured Home, pursuant to Bankruptcy Code 363(h).

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8 D. For such other relief that the Court determines is just and equitable under the
9 circumstances, including the segregation of the total sales price into that
10 portion attributable to the Manufactured Home and that portion attributable to
11 the Acreage, in the event that the Court determines the Defendants do have
12 some equitable interest in the Acreage.

13 DATED: August 25, 2006.

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16 /s/ Gregory J. Christensen
Gregory J. Christensen OSB #77139
17 Attorney for Plaintiff, Trustee Eric R.-T. Roost
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CERTIFICATION OF MAIL SERVICE

STATE OF OREGON)
)
County of Benton)

I hereby certify that on August 25, 2006, I served the foregoing PLAINTIFF'S 1st AMENDED COMPLAINT on the following attorneys, to wit:

D. RAHN HOSTETTER
Attorney at Law
POB 400
Enterprise, OR 97828

Attorney for Defendants

By mailing a true and correct copy of the original thereof, certified by me as such, addressed to said attorneys at the address shown above and deposited in the first class US Mail on said day with sufficient postage in a sealed, at the Post Office at Corvallis, Benton County, Oregon.

/s/ Gregory J. Christensen
Gregory J. Christensen
Attorney for Plaintiff